TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 35

HANS ACKERMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 13, 1950.

Petition for Certiorari Filed March 27, 1950.
Certiorari Granted May 29, 1950.

[fol. 1] [Caption omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

Civil Action No. 132

UNITED STATES OF AMERICA

vs.

HANS AKERMANN

COMPLAINT—Filed July 20, 1942

To the Honorable W. A. Keeling, Judge of Said Court:

Now comes the United States of America, hereinafter styled plaintiff, acting by and through Ben F. Foster, United [fol. 2] States Attorney for the Western District of Texas, and J. M. Burnett, Assistant United States Attorney, complaining of Hans Ackermann, hereinafter styled defendants, and presents this original complaint for the cancellation of a certificate of naturalization heretofore issued to the defendant by this Court, said proceeding for cancellation being brought in accordance with and under the authority of Section 738, Title 8, United States Code; and for cause of action plaintiff respectfully represents the following:

I

The defendant herein, Hans Ackermann, a native and former citizen of the German Reich, resides in Taylor, Williamson County, Texas. On September 15, 1933, the defendant filed in this Court his declaration of intention to become a citizen of the United States of America, such declaration of intention being numbered 706.

II

Thereafter, on or about January 25, 1938, the defendant filed his petition for citizenship, said petition being numbered 835, and thereafter, on June 17, 1938, upon the representation by defendant that he had renounced and was renouncing all allegiance to any foreign government or

sovereign, a certificate of citizenship nu[illegible]ered 4487510 was issued to him and by order of this Cou[illegible] became a naturalized citizen of the United States. In his petition for naturalization, which was made under oath, the defendant expressly represented that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. He further stated that it was his intention to be-[fol. 3] come a citizen of the United States of America and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to the German Reich.

III

That on or about June 17, 1938, and prior to the issuance of the certificate of citizenship to the defendant by this Court as aforesaid, the defendant in open Court took the following oath:

"I hereby declare, on oath, that I absolutely and entirely renounce and adjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the German Reich, of which I have heretofore been a citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligations freely without any mental reservation or purpose of evasion; So Help Me God."

IV

That the said petition for naturalization of the said Hans Ackermann, and more particularly the paragraph thereof to the effect that the said Hans Ackermann was attached to the principles of the Constitution of the United States, was untrue, false and fraudulent in that the said Hans Ackerman was then and there not attached to the principles of the Constitution of the United States and it was not then and there his intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly [fol. 4] to the German Reich, of which country he was at that time a subject, and said representations in said petition

contained to the effect that the defendant was attached to the principles of the Constitution of the United States and that he did intend to renounce all allegiance were false and fraudulent in the following respects:

1. He was not attached to the principles of the Constitution of the United States but, on the contrary, at the time of the filing of said petition was attached to the prinsiples and government of the German Reich.

2. He did not intend to renounce allegiance to the German Reich but, on the contrary, intended to keep his allegiance to the German Reich.

V

That on or about June 17, 1938, when the defendant Hans Ackermain took the oath described in paragraph III above, he took the same falsely and fraudulently in the following respects:

1. He did not absolutely and entirely renounce and adjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the German Reich, but on the contrary, kept his allegiance and fidelity to the German Reich, aiding and assisting the German Reich and its agents and representatives in the interests of Germany and contrary to the interests of the United States; that defendant on numerous times and occasions openly made utterances showing his allegiance and fidelity to the German Reich of which he had theretofore been a citizen;

[fol. 5] 2. That when he swore that he would support and defend the Constitution of the United States of America and the laws thereof against all enemies, foreign and domestic, that he kept a mental reservation, to-wit, that he would not support and defend the Constitution and laws of the United States against German enemies and would aid the German Reich, its agents and representatives in this country as much as he could;

3. That when he swore that he would bear true faith and allegiance to the same, he swore falsely, in that he did not intend to bear true faith and allegiance, but, on the contrary, intended to bear faith and allegiance to the Ger-

man Reich and its cause, and did all in his power to aid the German Reich in its cause;

4. That when he swore that he took the obligation freely without any mental reservation or purpose of evasion, he swore falsely in the following respects:

(a) He had a mental reservation to keep and hold his allegiance and fidelity to the German Reich.

(b) He had a mental reservation that he would not support and defend the Constitution and laws of the United States of America against the German Reich and its interests.

(c) That he had a secret reservation that he would not bear true faith and allegiance to the United States of America where his doing so would conflict with the faith and allegiance which he bore to the German Reich.

VI

By means of his fraudulent misrepresentations, declarations, statements, and oath, as hereinabove described, the [fol. 6] said defendant Hans Ackermann fraudulently and with intent to fraudulently acquire a certificate of naturalization from this Honorable Court, did so acquire such a certificate when, had the Court known the truth in regard to said defendant's intent, said certificate of naturalization would never have issued.

VII

The defendant Hans Ackermann as hereinabove set out, obtained his citizenship by fraud and within the meaning of Section 738, Title 8, United States Code, the said certificate was obtained illegally.

Wherefore, the United States of America prays that the defendant Hans Ackermann be summoned to appear and answer herein and that an order be entered revoking and setting aside the aforesaid decree of naturalization, canceling the said certificate of naturalization and directing the surrender of said certificate of naturalization to the Clerk of this Court; and that the defendant be forever restrained and enjoined from claiming any right, privilege, benefit or advantage whatsoever under said certificate of

naturalization; and for such other and further relief as may be proper.

(S.) Ben F. Foster, United States Attorney, (S.) J. M. Burnett, Assistant U. S. Attorney, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed September 11, 1942

To the Honorable W. A. Keeling, Judge of Said Court:

Heretofore, defendant, Hans Ackermann, has filed in this cause his Motion for Bill of Particulars and a true copy of same has been duly served upon plaintiff's attorney, Honorable Ben F. Foster, United States Attorney, 347 Federal Building, San Antonio, Texas, which said motion has not been passed upon by the Court at the time of the filing of this answer, but defendant, without waiving his said motion and still insisting that same should be in all respects granted by the Court, and reserving his right and privilege to file an answer after the Court passes upon said motion, answers the complaint herein so far as he can answer same in view of its allegations which are vague, indefinite and wholly lacking in particulars as pointed out in said motion, and reserving his exception in the event the Court overrules or dismisses said motion or any part thereof, admits, denies, and avers as follows:

I

Plaintiff's complaint does not state a cause of action upon which any relief can be granted.

II

Defendant admits that he is a native and former citizen of Germany and he now resides in Taylor, Williamson County, Texas, and that he filed his declaration of intention to become a citizen of the United States of America.

[fol. 8]

III

Defendant admits that he filed his petition for citizenship and thereafter, made representations substantially the same as alleged in Subsection II of the complaint, and a certificate of citizenship was issued to him and by order of Court he became a naturalized citizen of the United States, and he avers that all of such representations were true and correct.

IV

Defendant admits that prior to the issuance of his certificate of citizenship, he took the oath, or substantially the same oath, that is set out in Subsection III of the complaint.

V

Defendant admits that at the time of filing his petition for naturalization he was a subject of the German Reich, but he denies each and all of the other allegations in Subsection IV of the complaint so far as he understands its allegations which are vague, indefinite and wholly lacking in particulars, and he avers that at said time he was attached to the principles of the Constitution of the United States so far as he knows same, and he does not know what principles of the Constitution of the United States plaintiff charges him with not being then and there attached to; that then and there it was his intention to renounce and he did renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty and particularly the German Reich; that at the time of the filing of said petition he was not attached to the principles and government of the German Reich so far as he knows same [fol. 9] and he does not know what principles of the German Reich plaintiff accuses him of being attached to; and that he then and there did not intend to keep his allegiance to the German Reich, but intended to bear true fidelity and allegiance to the Constitution and Laws of the United States of America.

VI

The allegations in Subsection V of the complaint are so vague, indefinite, and wholly lacking in particulars, particularly the allegations that defendant has aided and assisted the German Reich, its agents and representatives in the interests of Germany and contrary to the interests of

the United States and has made utterances showing his allegiance and fidelity to the German Reich, that it is impossible for defendant to ascertain therefrom the acts and utterances plaintiff is accusing him of being guilty of, but so far as defendant understands such allegations and can guess what is meant by same, he denies each and every allegation in said subsection of the complaint, and he particularly denies that he has ever knowingly or wittingly aided or assisted the German Reich and its agents and representatives in the interests of the German Reich and contrary to the interests of the United States, but he cannot say that he has not done things which the pleader believes aided and assisted the German Reich and its agents and representatives in the interests of Germany and contrary to the interests of the United States; and he cannot tell from the complaint what utterances plaintiff is accusing him of making, but defendant avers that he has never knowingly or wittingly made any utterances of any kind which show that he bears allegiance and fidelity to the German Reich, because he does not bear allegiance or fidelity to the German Reich and did not bear allegiance [fol. 10] and fidelity to the German Reich at the time he filed his petition for citizenship nor at the time he took the oath set out in Subsection III of the complaint nor at the time his certificate of citizenship was issued to him, and at none of said times did he have a mental reservation that he would not support and defend the Constitution and Laws of the United States against German enemies, and would aid the German Reich, its agents and representatives in any manner contrary to the interests of the United States.

VII

Defendant denies, all and singular, the allegations in Subsection VI of the complaint.

VIII

Defendant denies all of the allegations made in Subsection VII of the complaint.

IX

Further answering the allegations of plaintiff's complaint, defendant denies each and every of the allegations therein contained not hereinbefore specifically admitted to be true.

Wherefore, having fully answered plaintiff's complaint so far as he can answer same in view of the allegations which are vague, indefinite, and wholly lacking in particulars, defendant demands judgment dismissing plaintiff's complaint at plaintiff's costs.

(S.) E. M. Grimes, Attorney for Defendant.

Taylor, Texas.

[File endorsement omitted.]

[fol. 11] In District Court of the United States for the Western District of Texas, Austin Division

Civil Action No. 132

United States

vs.

Hans Ackermann

Civil Action No. 133

United States

vs.

Max Herman Keilbar

Civil Action No. 150

United States

vs.

Frieda Ackermann

Order Consolidating Causes for Trial—Filed July 7, 1943

On the 30th day of June, A. D. 1943, came on to be heard motion of the United States of America, plaintiff in each of the above numbered and entitled causes, and the defendants, Hans Ackermann and Max Keilbar, appeared by and through their attorney, E. M. Grimes, and Frieds Ackermann, defendant, did not appear and is not represented by counsel, and the plaintiff appeared by and through Ben F. Foster, United States Attorney for the Western District of Texas, and J. M. Burnett, Assistant United

States Attorney, and the Court after fully considering said motion and hearing counsel on both sides, is of the opinion that said cases are of the same type and that the defendants are closely related by blood and marriage and that plaintiff will introduce much of the same proof and produce many of the same witnesses in each of said cases and that said cases should be tried together, and this matter was held open until the 7th day of July, 1943, for the purpose of allowing counsel for defendants Hans Acker-
[fol. 12] mann and Max Herman Keilbar to submit authorities and argument why motion of the United States should not be granted, and it appearing that counsel for defendants Hans Ackermann and Max Keilbar has not submitted any authorities and has not further appeared in this matter:

It Is, Therefore, Ordered that the above causes are to be heard and tried together on November 1, 1943, at Austin, Texas, to which defendants Hans Ackermann and Max Herman Keilbar excepted.

Done at San Antonio, Texas, this 7 day of July, A. D. 1943.

(S.) W. A. Keeling, United States District Judge.

Approved: (S.) Ben F. Foster, United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW—December 7, 1943

The Court, having considered the proposed findings of fact and conclusions of law submitted by the United States Attorney and defendant's objections thereto, timely pre-
[fol. 13] sented, finds the facts in the above entitled and numbered cause to be as follows:

I

Those acts admitted in the pl-adings of the parties.

II

Hans Ackermann was born in Germany.

III

On September 15, 1933, in the District Court of Williamson County, Texas, Hans Ackermann filed his Declaration of Intention to become a citizen of the United States of America.

IV

On January 25, 1938, in the United States District Court for the Western District of Texas, Austin Division, Hans Ackermann filed his Petition for Naturalization.

V

On June 14, 1938, in the United States District Court for the Western District of Texas, Austin Division, Hans Ackermann took his oath of allegiance and thereafter, on June 17, 1938, was issued Certificate of Citizenship No. 4487510.

VI

That the petition was untrue, false and fraudulent in that Hans Ackermann (a) was not then attached to the [fol. 14] principles of the Constitution of the United States, and (b) it was not then his intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty and particularly to the German Reich, of which country he was at that time a subject.

VII

That the oath of allegiance taken by Hans Ackermann was false and fraudulent in that:

(a) He did not absolutely and entirely renounce and adjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to the German Reich, but, on the contrary, kept his allegiance to the German Reich;

(b) That when Hans Ackermann swore he would defend and support the constitution of the United States of America and the laws thereof against all enemies, foreign and domestic, he had a mental reservation, to-wit, that he would not support and defend the laws and constitution

of the United States against all enemies foreign and domestic;

(c) When Hans Ackermann swore that he would bear true faith and allegiance to the constitution and laws of the United States of America, he swore falsely in that he did not intend to bear true faith and allegiance to the same;

(d) That when Hans Ackermann swore that he took the obligation and oath of allegiance freely and without any mental reservation or purpose of evasion, he swore falsely in that (1) he had a mental reservation to keep [fol. 15] and hold his allegiance and fidelity to the German Reich; (2) he had a mental reservation that he would not support and defend the constitution and laws of the United States of America against the German Reich and its interests; and (3) he had a secret mental reservation that he did not bear true faith and allegiance to the United States of America where his doing so would conflict with the faith and allegiance which he bore to the German Reich.

VIII

That Hans Ackermann was and is attached to the principles of German National Socialism and the Third Reich, both of which are opposed in all respects to the principles of democracy and to the constitution of the United States. One who believes in the National Socialist philosophy and form of government of the Third Reich cannot at the same time be loyal to the United States nor attached to the principles of the Constitution and laws of the United States.

Conclusions of Law

I

Order admitting Hans Ackermann to citizenship and Certificate of Citizenship granted him were obtained by fraud.

II

That said order and certificate were illegally procured by means of his oath falsely made, that he had renounced all fidelity to the German Reich and that he would bear [fol. 16] true faith and allegiance to the Constitution and laws of the United States of America.

Done at Austin, Texas, this the 7th day of December, A. D. 1943.

(S.) W. A. Keeling, United States District Judge.

Filed 22nd day of December, 1943.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—December 7, 1943

On the 1st day of November, A. D. 1943, came on to be heard the above entitled and numbered cause, and came the plaintiffs by their attorneys and the defendant, Hans Ackermann by his attorney, and announced ready for trial, and the Court having heretofore consolidated this cause with causes numbered Civil Action No. 133, United States of America v. Max Herman Keilbar, and Civil Action No. 150, United States of America v. Frieda Ackermann, for the purpose of trial, proceeded with the trial of this cause, and after hearing the pleadings, the evidence and argument of counsel, is of the opinion that the clear, unequivocal and convincing evidence establishes the truth of the allegations contained in the complaint, and plaintiffs are entitled to judgment as prayed for:

It Is, Therefore, Ordered, Adjudged and Decreed that the order of this Court made on June 14, 1938, admitting Hans Ackermann to citizenship in the United States of America be, and the same is hereby, canceled and set [fol. 17] aside; that the Certificate of Naturalization heretofore issued Hans Ackermann be, and the same is hereby, canceled, and Hans Ackermann is hereby directed to surrender said Certificate of Naturalization to the Clerk of this Court; that Hans Ackermann be, and he is hereby, forever restrained and enjoined from claiming any right, privilege, benefit or advantage whatsoever under said certificate of naturalization; and that the costs be, and they are hereby, assessed against him.

Done at Austin, Texas, this the 7th day of December, A. D. 1943.

(S.) W. A. Keeling, United States District Judge.

Approved: Ben F. Foster, United States Attorney, By J. M. Burnett, Assistant U. S. Attorney, Attorneys for Plaintiffs.

Approved as to form only: (S.) E. M. Grimes, Attorney for Defendant.

Filed 22nd day of December, 1943, at 11:05 o'clock A. M.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S MOTION TO BE RELIEVED FROM FINAL JUDGMENT—Filed March 25, 1948

To the Said Honorable Court:

Hans Ackermann, defendant, invoking the jurisdiction of this Court under Rule 60, Rules of Civil Procedure for District Courts, respectfully prays that the Court set aside and hold for naught the final judgment entered herein on December 7, 1943, canceling and setting aside the order of this Court admitting defendant to citizenship in the United States of America, canceling the certificate of naturalization theretofore issued to defendant, directing defendant to surrender said certificate of naturalization to the Clerk of this Court, and restraining and enjoining this defendant from claiming any right, privilege, benefit or advantage whatsoever under said certificate of naturalization, and for grounds would respectfully show the Court that relief from the operation of said judgment is justified and it is no longer equitable that said judgment should have prospective application for the following reasons:

I

That on the same day said judgment was entered against this defendant a similar judgment was entered against defendant's wife, Frieda Ackermann, in Civil Action No. 150 in this Court; that defendant's failure to appeal from said judgment is excusable for the following reasons: At the time said judgment was entered defendant did not have any money or property other than a home at Taylor, Texas, owned by him and his wife. Said home was then

worth not exceeding $2,500.00, and the costs of transcrib-
[fol. 19] ing the evidence and printing the record and brief on appeal were estimated at not less than $5,000.00. Almost immediately after said judgment was entered, to-wit, on December 11, 1943, defendant and his wife were arrested as being potentially dangerous to the public peace and safety of the United States and placed under detention in Alien Detention Station, Seagoville, Texas. Prior to the expiration of the time within which defendant could have perfected an appeal from said judgment, he was advised by his attorney that he and his wife could not appeal from said judgments on affidavits of inability to pay costs of appeal or give security therefor unless they first appropriated said home to the payment of such costs to the full extent of the proceeds of a sale thereof. Such information greatly distressed defendant and his wife and they sought advice from an officer of the United States of America then located at said detention station, such officer being W. F. Kelley, Assistant Commissioner for Alien Control, Immigration and Naturalization Department, defendant and his wife then being in the custody of said officer and he being a person in whom they had great confidence. Said Kelley being informed with respect to the financial condition of defendant and his wife and being informed with respect to the advice of their attorney that it would be necessary for them to dispose of their home in order to appeal from said judgments, advised them in substance to "hang on to their home", and in reply to their questions with respect to what their status would be after termination of the war between the United States and Germany, told them that they had lost their American citizenship but had not reacquired their German citizenship, that they were stateless, and would be released at the end of the war. Defendant and his wife relied on such assurance from said Kelley and by reason of reliance thereon refrained from appealing from said judgments.

[fol. 20] II

That after the time within which defendant and his wife could have appealed from said judgments, the Attorney General of the United States issued orders that defendant and his wife be interned, such order as to each of them being dated April 29, 1944; that by orders dated January

15, 1946, the Attorney General ordered that, in the event defendant and his wife failed to depart from the United States within thirty days from the date they were notified of said orders, the Commissioner of Immigration and Naturalization was directed to provide for their removal to Germany; that under pertinent Presidential Proclamations and certain regulations defendant and his wife were entitled to be released for thirty days in order that they might have an opportunity to leave the United States; that there was a delay in granting them such thirty day period, and during such delay they instituted habeas corpus proceedings for the purpose of effecting their release from inter-ment; that they have never been accorded a hearing in conformity with the requirement of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of his liberty without due process of law; that the Attorney General determined the propriety of their inter-ment, and such determination was based upon hearings for which they were not furnished with charges against them, at which they were denied the right to be represented by counsel, were not confronted by witnesses against them, and were not afforded the opportunity to cross-examine witnesses against them, the Attorney General having made the charges, heard the evidence, if any, passed upon the sufficiency thereof and judged the matter, and no proceeding against them having ever been instituted in any Court of the United States to determine the propriety of their inter-ment, and defend-
[fol. 21] ant and his wife so alleged in said habeas corpus proceedings that the person who had custody of defendant and his wife contested the granting of the writs of habeas corpus prayed for in said proceedings, asserting that defendant and his wife were not entitled to a hearing in conformity with said requirement of the Fifth Amendment to the Constitution because their status is that of alien enemies; that said orders directing the removal of defendant and his wife to Germany were predicated upon the fact that their status is that of alien enemies and that they were interned; that defendant and his wife are now on parole under the supervision of the Immigration and Naturalization Service and subject to the conditions and requirements of the orders granting them such paroles that said orders directing their removal to Germany have never been set aside or canceled; that defendant's said depriva-

tion of his liberty and his said impending removal to Germany are the result of and made possible by the judgment herein.

III

That said judgment has no valid foundation in law or in fact, being based upon erroneous conceptions of applicable law and the evidence being insufficient to support the conclusions of ultimate facts and of law on which the Court based the decision herein; that defendant proposes to substantiate the last preceding allegation by producing at the hearing on this motion all material evidence adduced at the trial of this case, and cite pertinent authorities including, among others, the cases of Baumgartner vs. United States, 322 U. S. 694, 64 S. Ct. 1240, and Meyer vs. United States, (C. C. A. 5) 141 F. (2d) 825; that defendant verily believes and alleges as a fact that if he had appealed from said judgment it would have been reversed [fol. 22] with instructions to dismiss the complaint on its merits; that Civil Action No. 133 in this Court, Austin Division, was the case of United States vs. Max Herman Keilbar, and was a companion case with this case and the above mentioned action against defendant's wife, Frieda Ackermann; that said three cases were consolidated for trial purposes and the evidence was in all substantial respects exactly the same in each case; that said Keilbar appealed his case to the United States Circuit Court of Appeals for the Fifth Circuit, and while said appeal was pending, the United States of America, acting by and through the United States Attorney for the Western District of Texas, under the authority of the Attorney General of the United States, stipulated in said Appellate Court as follows: "That the evidence in this case is insufficient to support the conclusions of ultimate facts and of law of the Court below and that judgment of this Court be entered reversing the judgment of the United States District Court for the Western District of Texas, Austin Division thereof, in Cause Number 133 Civil, entitled United States of America versus Max Herman Keilbar, and remanding same to the Trial Court with instructions to dismiss the complaint on its merits."

IV

That defendant's failure to appeal from the judgment herein is excusable for the reasons alleged above and it is

inequitable and unjust that the judgment herein should have prospective application; and that relief from the operation of said judgment is justified by the facts alleged above in this motion.

Wherefore defendant prays that the Court set aside and hold for naught said final judgment entered herein on [fol. 23] December 7, 1943, and that the complaint herein be dismissed on its merits.

George C. Dix, 60 Wall Street, New York 5, New York. Grimes & Owen, by E. M. Grimes, Attorneys for Defendant, Taylor, Texas.

Duly sworn to by Hans Ackermann. Jurat omitted in printing.

I certify that a copy of the foregoing motion has been mailed to Honorable Tom C. Clark, Attorney General of the United States, Washington, D. C., and a copy thereof has been mailed to Honorable Henry W. Moursund, United States Attorney, San Antonio 6, Texas, this the 25th day of March, 1948.

(S). E. M. Grimes, Attorney for Defendant.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS "DEFENDANT'S MOTION TO BE RELIEVED FROM FINAL JUDGMENT"—Filed March 31, 1948

Now comes the United States of America acting by, and through its attorney, the United States Attorney for the Western District of Texas, and moves the Court to dismiss the "Defendant's Motion to be Relieved from Final Judgment" heretofore filed in the above entitled and numbered cause, and for grounds would show the Court that said Motion of Defendant does not state grounds sufficient to invoke the authority of the Court to set aside the judgment heretofore entered in this cause.

(S.) H. W. Moursund, United States Attorney.

I certify that a copy of the foregoing motion has been mailed to E. M. Grimes, Attorney for Defendant, at his office at Taylor, Texas, this 30 day of March, 1948.

(S.) H. W. Moursund, United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING DEFENDANT'S MOTION TO BE RELIEVED FROM FINAL JUDGMENT—Filed September 28, 1948

The Court having considered Defendant's Motion to be Received from Final Judgment filed herein on March 30, [fol. 25] 1948, is of the opinion that there is no merit to said motion and that the same should be denied.

It Is, Therefore, Ordered that said motion be, and the same is hereby, denied.

Done at San Antonio, Texas, this the 28 day of September, A. D. 1948.

(S.) Ben H. Rice, Jr., United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted].

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS—Filed October 7, 1948

Notice is hereby given that Hans Ackermann, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on September 28, 1948, being an order denying on its merits Defendant's Motion to be Relieved from final Judgment.

George C. Dix, 60 Wall Street, New York 5, New York; Grimes & Owen, Taylor, Texas, by E. M. Grimes, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 26-29] Bond on appeal for $250.00, filed October 7, 1948, omitted in printing.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD IN CIRCUIT COURT OF APPEALS—Filed October 25, 1948

This day came on to be considered by the Court the motion of defendant-appellant, Hans Ackermann, for the Court to grant an extension of time for filing the record and docketing the appeal in the Circuit Court of Appeals, and the Court having considered same, it is Ordered by the Court that said motion be, and the same is hereby, granted and that the time for filing the record on appeal and docketing the appeal in the Circuit Court of Appeals be, and is hereby, extended fifty days in addition to the forty days allowed by the applicable rule.

Done at San Antonio, Texas, this the 25th day of October, 1948.

(S.) Ben H. Rice, Jr., United States District Judge.

Approved:

George C. Dix, 60 Wall Street, New York 5, New York; Grimes & Owen, Taylor, Texas, by E. M. Grimes, Attorneys for Defendant-Appellant; H. W. Moursund, United States Attorney, San Antonio, Texas, Attorney for Plaintiff-Appellee.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT AND STIPULATION AS TO RECORD ON APPEAL—Filed October 25, 1948

Defendant-appellant and plaintiff-appellee, acting through their attorneys of record, agree and stipulate as follows:

I

This case and the case of United States vs. Freida Ackermann, Civil Action No. 150 in the United States District Court for the Western District of Texas, Austin Division, wherein Freida Ackerman, defendant, is appellant, hereinafter called these cases, are companion cases in that both defendants were born in Germany; married each other in Germany; came to the United States as legal immigrants at the same time; have resided together in Texas ever

since they arrived in this coutr; became citizens by *natu* naturalization at their same time; judgments denaturalizing them were enterer in these cases on December 7, 1943; and in that the pleadings, motions, orders, findings of fact, conclusions of law and judgments in said cases are identically the same except as to the name of the defendant and the number of the action. These cases and the case of United States vs. Max Herman Keilbar, Civil Action No. 133 in said Court, same division, were consolidated for the purpose of trial and one opinion of the Court covered all three cases, which opinion is reported in 53 Federal Supplement, beginning at page 611. The Keilbar case was appealed to the Circuit Court of Appeals for the Fifth Circuit, No. 11,140 in said Court, and reversed on its merits by that Court on October 2, 1944. 144 F. (2d) 866.

[fol. 32] II

On March 25, 1948, the defendants, respectively, filed in these cases, respectively, a pleading designated "Defendant's Motion to be Relieved from Final Judgment." On March 30, 1948, plaintiff filed in each of said cases a motion designated "Respondent's Motion to Dismiss 'Defendants Motion to be Relieved from Final Judgment'," which motion in each of said cases was heard and taken under consideration by the Court on June 14, 1948. No action was taken by the Court on plaintiff's said motions prior to September 28, 1948, on which date he entered in each of said cases an order designated "Order Denying Defendant's Motion to be Relieved from Final Judgment," which orders erroneously recited that defendants' said motions were filed on March 30, 1948, while, in fact, they were filed on March 25, 1948. Said orders were entered by the Court without any hearing of any kind other than the above menfioned hearing on plaintiff's said motions dsign-ed "Respondent's Motion to Dismiss 'Defendants Motion to be Relieved from Final Judgment'" and the Court did not any time permit the introduction of any testimony or other evidence. However, on his own volition, the Court read evidence in the transcript of the record in the above mentioned Keilbar case which contains all of the evidence in these cases and copies of which are on file in the Keilbar appeal, No. 11,140, Circuit Court of Appeals, Fifth Circuit.

III

The record on appeal in this case shall be composed of the following:

(1) Complaint.

[fol. 33] (2) Answer.

(3) Order consolidating causes for trial.

(4) The Court's findings of fact and conclusions of law.

(5) Judgment.

(6) Defendant's motion to be relieved from final judgment.

(7) Respondent's motion to dismiss "Defendant's motion to be relieved from final judgment."

(8) Order denying defendant's motion to be relieved from final judgment (being the order from which appellant appeals).

(9) Notice of appeal to the Circuit Court of Appeals.

(10) Bond for costs on appeal.

(11) Order extending time for filing record in Circuit Court of Appeals.

(12) Agreed statement and stipulation as to record on appeal (this instrument).

IV

It is understood and agreed that the United States, by this agreement and stipulation as to record on appeal, does [fol. 34] not waive its contention that the order denying defendant's motion to be relieved from final judgment is not appealable.

George C. Dix, 60 Wall Street, New York 5, New York. Grimes & Owen, Taylor, Texas. By E. M. Grimes, Attorney for Defendant-Appellant. (S.) H. W. Moursund, United States Attorney, Attorney for Plaintiff-Appellee. San Antonio, Texas.

Approved, this the 25th day of October, 1948.

(S.) Ben H. Rice, Jr., United States District Judge.

[File endorsement omitted.]

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 10, 1949

No. 12610

HANS ACKERMANN

versus

UNITED STATES OF AMERICA

On this day this cause was called, and upon request of counsel, was taken under submission by the Court upon the record and briefs on file.

[fol. 37] OPINION OF THE COURT—Filed December 29, 1959

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12610

HANS ACKERMANN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of Texas

(December 29, 1949)

Before Hutcheson, Holmes, and Russell, Circuit Judges

RUSSELL, Circuit Judge:

The facts of this case do not bring it within the decision of *Klapprott v. United States*, 335 U. S. 601, and the trial Court did not hold that the grounds stated in the motion were not sufficient to invoke the authority of the Court. As

to this, the order of the Court recites that the Court, having considered the motion, "is of the opinion that there is no merit to said motion and that the same should be denied." [fol. 38] The fundamental difference between the *Klapprott* case and the present is that the rulings there made are predicated upon a state of facts entirely dissimilar in substance and legal effect to those here presented. While it was there necessary for the Court to discuss the effect and application of Rule 60 (b) of the Rules of Civil Procedure, what appears to have been controlling was that there had in fact been no real trial, and a judgment of denaturalization was entered by default at a time when the defendant was not only incarcerated, but immediately concerned with his defense against two criminal prosecutions instituted by the Government for matters not connected with the denaturalization proceeding. However, in the present case, the only detention of the movant arose directly from, and as the result of, the denaturalization proceeding now challenged. There was no prosecution for crime to distract his attention, and he was fairly faced with the question of whether he would proceed in the manner provided by law to correct the finding annulling his American citizenship. Indeed this was the only real question which confronted him. But this is not all. The movant here was not only represented by counsel, but employed counsel of his own selection, and who in fact now represents him in the prosecution of this appeal. He can not complain that his detention in itself prevented him from proceeding for the good reason, if no other, that it appears that he had in fact carried on habeas corpus proceedings seeking his release. Above all these differences, however, and a difference which renders patent the inapplicability of the Klapprott ruling, is the fact that in the present case there is no question raised of any inability of the movant to properly present his de- [fol. 39] fense at the original trial, as was the case with Klapprott. On the contrary, in appellant's case, it is undisputed that there was a full, adversary, proceeding conducted in the same manner as is all such litigation in the Federal Courts, and upon the conclusion of which the finding was adverse to the movant. Thus in the present case the movant has already had the one trial which justice and due process were deemed to require under the circumstances of the *Klapprott* case. It is hardly necessary to labor the question that there is a vast difference between the prin-

ciples properly to be applied to insure one fair trial (as in the *Klapprott* case), and the principles properly applicable to an instance as the present where there is no complaint that in the original, one fair trial,—actually had,—the movant was at any disadvantage, and the relief sought must therefore be, and is expressly, predicated upon reasons which it is claimed prevented an *appeal*. It is as to this question of appeal that the present motion relates. The ruling in the *Klapprott* case should not be extended to an appeal from what, even under the circumstances alleged, is only an erroneous judgment. The right of appeal from such a judgment is no part of due process. The right of a litigant to a trial in accordance with the forms of law, and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process. A ruling applicable to the latter right is not authority for excusing the failure to take an appeal. There must be, and there is, some finality to judgments rendered after a full and fair hearing.

So much for the inapplicability of the Klapprott ruling here. As has already been shown, the Court ruled upon the [fol. 40] merits of the motion. The motion to be relieved from the final judgment sets forth fully the contentions of the movant, but they may be fairly summarized as presenting only the grounds that the evidence in the original trial was insufficient to support the judgment, and that this was established by the stipulation of the Government to this effect entered in the case of one Keilbar, tried at the same time and under the same evidence as was movant, (*Keilbar v. U. S.*, 144 F. 2d 866); that movant was prevented from appealing the adverse judgment by poverty and detention as an enemy alien, and by the advice of the Assistant Commissioner for Alien Control, Immigration and Naturalization Department, who advised him in substance to "hang on to their home" rather than expend it by appealing; and that he had by orders dated January 15, 1946 (final judgment cancelling the certificate of naturalization being December 7, 1943), been ordered deported by the Attorney General. It is asserted that the failure to appeal from the judgment is excusable for these reasons and that "it is inequitable and unjust that the judgment herein should have prospective application."

The trial Judge was correct in his holding that none, or all, of these grounds presented any merit. Some ques-

tion may arise as to the pleaded contention that the evidence in the case of movant was the same as that in the case of his, in effect, codefendant, as to whom the Government conceded there was insufficient evidence to support the judgment cancelling the certificate of naturalization. However, on the ground of the sufficiency of the evidence, there is no ambiguity as to what the movant pleaded and [fol. 41] proposed to prove, and it is expressly averred, that this question was proposed to be substantiated "by producing at the hearing on this motion all material evidence adduced at the trial of this case [the original trial] and cited pertinent authorities . . . and . . . that if he had appealed from said judgment it would have been reversed with instructions to dismiss the complaint on its merits," as was the other proceeding referred to. In view of this statement, the stipulation in this record that upon the hearing of the motion no evidence was introduced but that "on his own volition, the Court read evidence in the transcript of the record in the above mentioned *Keilbar* case which contains all the evidence in these cases and copies of which are on file in the Keilbar appeal, No. 11,140, Circuit Court of Appeals, Fifth Circuit," carries great significance. This is the record upon which the movant proposed to establish the insufficiency of the evidence to support the judgment against him. The memorandum and findings of the trial Court in the original proceeding are set forth in *U. S. v. Ackermann*, 53 F. Supp. 611, and from this it appears that the evidence in this case as to the acts of the present movant was different from that as applicable to Keilbar, and especially as to acts and conduct during the critical period of the five years following the declaration of intention to become a citizen, which is of course of primary concern. Furthermore, with the issue thus tendered as to the validity of the judgment to be determined solely upon the evidence originally presented, the trial Court must be held to have [fol. 42] knowledge of such proceeding.[1] In addition, it is stipulated that he had actual knowledge thereof. Having such

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[1] Freshman v. Atkins, 269 U. S. 121, 124, and citations; DeBearn v. Safe Deposit Co., 233 U. S. 24; Nathel Corp. v. West Virginia Pulp & Paper Co., 141 F. 2d 1; Kitheart v. Metropolitan Life Ins. Co., 119 F. 2d 497; Kitheart v. Metropolitan Life Ins. Co., 88 F. 2d 407.

knowledge, there was no need under the circumstances here for any further hearing to determine the merits of this contention. The issue from that point on was one of law, and the trial Court rightfully held that the grounds asserted by the movant, when presented more than four years after the date of the judgment, afforded no valid basis for vacating or modifying the same. Though we sincerely sympathize with those whose poverty may induce them to abandon the taking of an appeal, this in and of itself has never been considered to afford ground for setting aside a judgment. Nor does advice from one having no responsibility in the conduct of litigation, to the effect that it would be best not to sacrifice what property one had to carry on an appeal, vitalize the insufficiency of poverty as a legal reason to set aside a judgment from which no appeal was had. Nor does the fact that the movant was in detention as an alien enemy, offer valid excuse since, as here, his motion shows that he was able to, and did, conduct, while detained, other litigation. Certainly the allegation that the Court of Appeals would have reversed the judgment if appealed, presents no ground for relief, and indeed the trial Court can not very well be required to exercise such power of determination of what the Appellate Court would have adjudged. The ruling announced in *United States v. Kunz*, 163 F. 2d 344, is even more applicable here, where, as stated, appellant was represented by employed counsel. It was there said: "The real complaint of Kunz, . . . is that he might have secured a reversal of the decree of denaturalization if he had taken an appeal. He was in custody while his time to appeal was [fol. 43] running and he says that rendered appealing impracticable. But he could have had a lawyer assigned to prosecute his appeal if he could not have obtained one himself. . . . The fact probably is that neither he nor his Bund associates set much value on American citizenship until the war was over, Germany ceased to be a good place to live in, and they were held for deportation. . . . After Kunz was subject to a decree of denaturalization he took no appeal. He cannot now employ a bill of review as a substitute for an appeal on the ground that the Supreme Court in the *Baumgartner* case had changed what was supposed to be the law. As that Court said, per Pitney, J., in *Simmons Co. v. Grier Bros. Co.*, 258 U. S. 82, 88, 42 S. Ct. 196, 66 L. Ed. 475, a change in the authorit-ive rule of law, resulting from a decision by this court announced subsequent to

the former decree, neither demonstrates an "error of law" apparent upon the face of that decree nor constitutes new manner in pais justifying a review. See also *Scotten v. Littlefield*, 235 U. S. 407, 411, 35 S. Ct. 125, 59 L. Ed. 289. In *Sunal v. Large*, 67 S. Ct. 1588, an attempt was made to use a writ of habeas corpus as a substitute for an appeal. In that situation Mr. Justice Douglas expressed the same view we are taking as to the use of a bill of review. His words seem most pertinent and were as follows: 'If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.' "

[fol. 44] The appellant fails to show any error in the judgment of the trial Court, and that judgment is

Affirmed.

HUTCHESON, Circuit Judge, Dissenting:

Upon the authority of *Klapprott v. United States*, 335 U. S. 601, I think the trial court erred in holding that the motion of appellant did not state sufficient grounds to invoke the authority of the court to set aside the judgment, and that the judgment appealed from should be reversed and the cause remanded to the district court for a hearing on the merits of appellant's motion to be relieved from the final judgment of denaturalization against him.

Rule 60(b) of the Federal Rules of Civil Procedure provides that, on motion and upon such terms as may be just, the court may relieve a party from a final judgment, order, or proceeding, for a number of specified reasons, and then adds: "or (6) any other reason justifying relief from the operation of the judgment". The *Klapprott* case, *supra*, had not been decided at the time the court below entered its judgment in this case. According to the majority opinion in that court, this provision of the rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice". p. 615.

I am not here indicating how I think the district judge should rule when the merits of the matter are before him

[fol. 45] for decision. I am stating merely that we should send the case back because the lower court, not having the benefit of the *Klapprott* case, held that the "grounds stated in the motion were not sufficient to invoke the authority of the court." I think the undenied facts stated in the motion called for the equitable consideration by the trial court of the matters presented therein.

I think the opinion of the majority completely misconceives the situation or denies the right to a hearing on the motion when it accords to the action of the district judge in "on his own volition"—reading the "evidence in the transcript" in the *Keilbar* case, the effect of granting petitioner's hearing on his motion. Cf. the opinion of this court, *Clay v. Calloway*, Trustee, Nov. 18, 1949.

I Dissent.

[fol. 46] JUDGMENT

Extract from the Minutes of December 29th, 1949

No. 12610

HANS ACKERMANN

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

"Hutcheson, Circuit Judge, Dissents."

[fol. 47] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 36 to 46 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit in a certain cause in said Court, numbered 12610, wherein Hans Ackermann is appellant, and United States of America, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 35 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 9th day of January, A. D. 1950.

Oakley F. Dodd, Clerk of the United States Court of Appeals, Fifth Circuit. (Seal.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9080)